

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD HALL,

Defendant-Appellant.

UNPUBLISHED

February 1, 2000

No. 210910

Jackson Circuit Court

LC No. 97-079268 FC

Before: Kelly, P.J., and Markey and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The court sentenced him to eight to twenty years' imprisonment for the first-degree criminal sexual conduct conviction and five to fifteen years' imprisonment for the second-degree criminal sexual conduct convictions. Defendant appeals as of right. We affirm.

The victim in this case, the daughter of defendant's ex-wife, testified that defendant first molested her on a trip back home from a visit with her father. During the time that defendant and the victim's mother were married, the victim visited her father every other weekend, and defendant regularly would pick up her up and take her back home. She testified that during these trips, defendant would ask her to scratch his back and the two would "give each other back scratches and stuff like that." Defendant would sometimes give the victim a couple of dollars for giving him a back rub or back scratch. On one of the trips, however, defendant asked the victim to "scratch" his genitals and offered to buy her candy if she would. The victim fondled defendant's penis for about ten minutes. Defendant then stopped at a gas station and bought her some candy. Defendant asked the victim not to tell anybody about their activity because they could both get in trouble.

The victim testified that defendant made the same request on subsequent trips from her father's house, offering her either money or candy, and she complied. Eventually, defendant began making the request at their Jackson County apartment when the two were up late watching television. He also asked to touch the victim's breasts and vagina and taught her how to masturbate him. The victim

complied, and defendant continued to pay her. The victim testified, however, that one night when she was about twelve years old, defendant got into bed with her and inserted his finger in her vagina. Because it hurt, the victim pulled away from defendant. She refused to touch defendant or let him touch her after that. The victim testified that she had let the activity go on as long as defendant always asked and she had some measure of control over the situation, and because he would pay her, give her candy, and take her side when she argued with her mother. But after the incident in her bed when he hurt her, she became frightened and decided to stop. Sometime thereafter, defendant and the victim's mother were divorced.

The victim testified that when she was about sixteen, she began visiting defendant at his home. Defendant would buy alcohol for her and her friends and let them smoke cigarettes and marijuana at his home and swim in his pool. The victim's parents learned of her smoking and drinking and confronted her about the activity. When she told them of defendant's involvement, they asked her why he would allow such activity. The victim then told them of the sexual abuse. Her parents took her to the police station so she could report the incidents and defendant subsequently was charged.

Defendant first argues on appeal that the trial court abused its discretion in admitting the testimony of his former girlfriend's thirteen- or fourteen-year-old daughter that he had molested her, because that evidence was probative of nothing more than defendant's propensity to engage in sexual activity with young girls, a purpose specifically excluded by MRE 404(b). This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Riegle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). This Court will not find an abuse of discretion merely because it determines that it would have ruled differently on a close evidentiary question. *Smith, supra* at 550.

MRE 404(b) governs admission of "other acts" evidence. It provides, in pertinent part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The standard regarding the admissibility of other acts evidence is set forth in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The evidence must be offered for a proper purpose under MRE 404(b); it must be relevant under MRE 402, as enforced through MRE 104(b); and, under the balancing test of MRE 403, the probative value of the evidence must not be substantially outweighed by unfair prejudice. *Id.* at 74-75. In addition, the trial court may provide a limiting instruction if requested. *Id.* at 75.

Here, the prosecution offered the other acts evidence for purposes listed as proper under MRE 404(b): to prove intent, absence of mistake, and defendant's common plan or scheme. However, mechanical recitation of a proper purpose is not enough; the court must also determine that the evidence is relevant. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). Under MRE 401, evidence is relevant if it is material and has probative value. *Id.* at 388. To be material, the proffered evidence must be related, or logically relevant, to an issue or fact of consequence at trial. *Id.* at 388-389; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence has probative value if it has any tendency to "make a material fact at issue more probable or less probable than it would be without the evidence." However, the *Crawford* Court cautioned that

the proffered evidence truly must be probative of something other than the defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. [*Id.* at 390.]

Here, defendant denied that the instances of molestation alleged by the victim ever took place. Thus, all elements of the first and second-degree criminal sexual conduct charges were at issue. See *Starr*, *supra* at 500-501. However, the only purpose for which the prosecution "w[o]ve a logical thread linking the prior act to the ultimate inference," *Crawford*, *supra*, was with regard to establishing defendant's scheme or plan. The prosecution argued that evidence of defendant's scheme, plan, or design was material in this case to "add credence" to the victim's testimony and put her behavior and defendant's behavior in context.

Citing *People v Sabin*, 223 Mich App 530, 536; 566 NW2d 673 (1997), defendant contends that the proffered other acts evidence is not relevant because the acts to which the girlfriend's daughter testified were not sufficiently similar to those alleged to have been perpetrated against the victim in this case to make that testimony probative of defendant's scheme, plan, or system. We disagree. There was physical similarity in the acts alleged by both girls and similarities in defendant's manner of approaching and treating them. In both cases, defendant began with ostensibly "innocent" touching. The victim testified that defendant asked her to scratch his back and that they would "give each other back scratches, and stuff like that." The girlfriend's daughter testified that defendant gave her back rubs. Defendant then progressed to touching their breasts and vaginal areas and asking them to touch his penis. Each girl testified that he asked her to masturbate him. Each girl testified to defendant's digital penetration of her vagina. There was testimony from both girls that he offered them money and/or candy as incentive to participate in the sexual activity and/or not tell others about it. Finally, when each girl told him she would no longer allow him to touch her, he stopped.

Moreover, in *Starr*, *supra*, our Supreme Court found that testimony of the defendant's younger half-sister that defendant had abused her before abusing the victim in that case, his minor adopted daughter, was admissible

to rebut defendant's claim of fabrication of the charges. Indeed, the half-sister's testimony was the only evidence to explain why the mother specifically questioned the victim about her relationship with her father, and *why the victim waited two years*

before telling her mother about the abuse she suffered at the hands of defendant.
[*Id.* at 501.]

Here, as in *Starr*, defendant denied the alleged incidents of abuse, and suggested that the victim fabricated the story of abuse because she was angry at him and to deflect her parents' anger at her when they discovered her drinking and smoking. Defense counsel also questioned the victim's failure to disclose the alleged abuse earlier. As the prosecution argued at trial, however, the victim had no reason to disclose the abuse earlier. To disclose would have hurt her mother and disrupted their lives, and because defendant stopped when the victim asked, she did not have to tell. However, by itself, testimony that defendant stopped the abuse when the victim told him to may not have seemed credible to the jury. Testimony from the former girlfriend's daughter that defendant stopped when she told him to made the victim's testimony credible.

We conclude that the challenged other acts evidence was relevant to proving the charged acts. The other acts were sufficiently similar to show a common plan or scheme, and the elements of that scheme were probative of why the victim did not reveal the abuse earlier and why she continued to visit defendant's home. From this, the jury could conclude that she was telling the truth and that defendant had committed the acts she alleged. Thus, the other acts evidence tended to prove an intermediate fact or issue, other than defendant's bad character, which is probative of the ultimate issue.

We next consider whether the probative value of the challenged other acts evidence was substantially outweighed by its potential for unfair prejudice. As in *Starr, supra*, the probative value of this evidence is relatively high. This case was essentially a credibility contest between the victim and defendant. There was no other corroborative evidence, such as medical reports or witness testimony. On the other hand, because the other acts were substantially similar to those alleged by the victim, the potential that the jury would use the evidence improperly to infer defendant's bad character was also high. However, the MRE 403 balancing test requires that the *unfair prejudice substantially outweigh* the probative value of the evidence. Furthermore, the trial court gave an appropriate limiting instruction to the jury. *VanderVliet, supra*. On balance, we cannot conclude that there was no excuse or justification for the court's ruling. *Riegle, supra*. Therefore, we find that the court did not abuse its discretion in admitting testimony regarding defendant's alleged molestation of the girlfriend's daughter.

Defendant also argues that the trial court abused its discretion in admitting other acts evidence that defendant provided alcohol to minors and allowed them to drink and smoke in his home. We disagree. As discussed above, defendant's theory was that the victim fabricated the allegations of abuse and he questioned her credibility based on her continuing to visit defendant at his home. Thus, the reason that the victim continued to visit defendant became a matter at issue. The evidence that defendant let the victim and her friends drink and smoke, and even provided alcohol for them at times, was evidence tending to show why the victim would continue to visit defendant. Again, the court gave a limiting instruction. Accordingly, we conclude that the probative value of the evidence was not substantially outweighed by unfair prejudice, and that the court did not abuse its discretion in admitting it.

Defendant argues next that he must be resentenced because the court relied on an improperly scored sentencing guideline. This Court reviews a defendant's sentence to determine whether the sentencing court abused its discretion by violating the principle of proportionality. *People v St. John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). The principle of proportionality requires that a sentence be proportionate to the seriousness of the crime and the defendant's prior record. *Id.* A sentence that falls within the applicable judicial sentencing guidelines is presumed proportionate. *People v Lyons*, 222 Mich App 319, 324; 564 NW2d 114 (1997).

A defendant is not entitled to have a sentence vacated on the basis of an alleged miscalculation of the sentencing guidelines. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997); *St. John*, *supra*. Furthermore, we conclude that defendant's sentence was not disproportionate. As the trial court noted, the minimum sentence imposed, eight years, is still within the range of the B-II category that would have applied had the court not scored the fifteen points of which defendant complains under OV 25 of the Michigan Sentencing Guidelines. Because a minimum sentence that falls within the guidelines is presumed proportionate, defendant's minimum sentence of eight years would be presumed proportionate regardless of the challenged scoring. While defendant attempts to overcome that presumption by citing several mitigating factors, we note that a number of those factors are already taken into account in the scoring of the sentencing guidelines. The record shows that the trial court duly considered the seriousness of the crime and defendant's prior record. Because defendant's sentence is not disproportionate, there is no basis for relief on appeal. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998).

Defendant argues next that the prosecutor's improper statements during closing argument deprived him of a fair trial. Because defendant did not object at trial to the alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair trial. *Id.*

Defendant contends that the prosecutor improperly encouraged the jury, on the basis of the other acts evidence, to convict defendant on the basis that he is a "bad man." However, our review of the challenged statements in context shows that the prosecutor argued the evidence to show that defendant engaged in a pattern of seduction and molestation. The prosecutor also argued that even though defendant may not fit the stereotypical notion of a child molester, he did molest a child, and that he had a powerful reason to lie about it. The prosecutor is allowed to argue the evidence and reasonable inferences that can be deduced therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Furthermore, he need not state the inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Finally, the prosecutor, as well as the court, cautioned the jury that they could not use the evidence of defendant's alleged molestation of Lindsey to convict defendant because he is "a bad man." Accordingly, we conclude that the prosecutor's comments did not deny defendant a fair trial.

Defendant's final argument on appeal is that he was denied a fair trial because he did not receive effective assistance of counsel. Defendant did not move for an evidentiary hearing or new trial based on ineffective assistance of counsel in the trial court. Therefore, this Court's review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Pickens, supra* at 314. The defendant must also overcome a strong presumption that his counsel's actions constituted sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant first contends that trial counsel was ineffective because he failed to dismiss two jurors who expressed reservations about being able to fairly judge a defendant charged with criminal sexual misconduct. However, the record shows that each of those witnesses subsequently stated that he believed he could be fair to defendant. Furthermore, the record does not reveal what information either juror's questionnaire contained, or what information was revealed by the questionnaires of other jurors in the pool. Therefore, defendant has failed to overcome the presumption that defense counsel's decision not to exercise peremptory challenges to exclude these two jurors was trial strategy.

Defendant also claims that trial counsel was ineffective because he did not object to the prosecutor's characterization of defendant as a child molester during voir dire and closing argument. However, we have already concluded that the prosecutor's remarks were not improper. Counsel is not ineffective for failing to make futile objections. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989). In any event, defendant has not overcome the presumption that defense counsel's failure to object was trial strategy, nor established that he was prejudiced by counsel's failure to object to the prosecutor's statements. Although he did not object, in his closing, defense counsel responded to the prosecutor's references to "child molesters" by highlighting all the evidence that countered that characterization of defendant. Counsel specifically argued that defendant's behavior was not the sort typical of a "pedophile." Thus, even if the prosecutor's statements were improper, defendant has not established that, but for counsel's error in not objecting, the result of the proceeding would have been different. *Pickens, supra*.

Affirmed.

/s/ Jane E. Markey

/s/ Jeffrey G. Collins

I concur in result only.

/s/ Michael J. Kelly